PP v. NORHAYATI HASHIM & ANOR

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID JC
[CRIMINAL APPEAL NO: PA-41H-32-12-2019]
30 JUNE 2020

CRIMINAL LAW: *Penal Code – Section 317 – Offence of leaving child with intention of wholly abandoning child – Grandmother and mother of child pleaded guilty to charge – Whether ingredients of charge fulfilled – Whether grandmother person 'having care of such child' stipulated in s. 317 – Whether grandmother had duty to care for child – Child Act 2001, s. 31(1)*

CRIMINAL PROCEDURE: *Sentencing – Principles of – Adequacy of sentence – Accused persons pleaded guilty to leaving child with intention of wholly abandoning child – Accused persons each sentenced to one month imprisonment and fine of RM3,500, in default seven months' imprisonment – Whether sentence adequate and proportionate – Whether reflected seriousness of offence – Penal Code, ss. 34 & 317 – Whether ss. 173A and 294 of Criminal Procedure Code applied*

The respondents pleaded guilty at the Magistrate's Court, to a charge under s. 317 read together with s. 34 of the Penal Code ('PC'), for leaving a newborn infant in a box at a mosque, with the intention of wholly abandoning the said infant. The first and second respondents, the grandmother and the mother of the infant, respectively, were each sentenced to one month imprisonment and a fine of RM3,500, in default seven months' imprisonment. In passing the sentence, the Magistrate took into account: (i) the respondents' plea of guilty; (ii) the infant was already in a safe environment as he was adopted; (iii) the respondents were single mothers with limited financial resources; and (iv) the respondents were first offenders. Dissatisfied, the appellant ('prosecution') appealed against the sentence on the grounds that: (i) the sentence was inadequate as the offence of abandoning an infant, which was serious and had become rampant, deserved a deterrent sentence; (ii) the second respondent had ample time during her pregnancy to decide on what to do with the unwanted child; and (iii) the respondents' act exposed the infant to risks of injury and death. Objecting to the appeal, the respondents argued that (i) the charge was defective for identifying and referring the first respondent as the grandmother and not the person 'having care of such child', as stipulated in s. 317 of the PC; (ii) the decision of the Magistrate ought not to be disturbed as the respondents had served their custodial sentence; and (iii) since the offence under s. 317 of the PC falls within the definition of non-serious offence, as provided under s. 52A of the PC, the court should consider the applicability of s. 173A of the Criminal Procedure Code ('CPC'), to discharge conditionally or unconditionally, and s. 294 of the CPC, for first offenders.

Held (allowing appeal):

(1) The ingredients that need to be proven to establish an offence under s. 317 of the PC are (i) the person charged with the offence must be a father, mother or a person having care of the child; (ii) the child is below 12 years old; and (iii) there has been an exposure and abandonment of the child. (para 14)

(2) The offence under s. 317 of the PC is premised on a criminal breach of duty of a person having care of the child; whether that person is the father, mother or a third party (who may or may not have any blood relationship with the child). Care of child is not defined under s. 317 of the PC. However, guided by s. 31(1) of the Child Act 2001, s. 317 of the PC means to dutifully protect a child from any form of physical, mental and emotional injury and that duty to protect includes the duty to not expose or leave that child in any place with the intention of abandoning such child. The duty arises from either (i) through the natural bond that exists between the child and that such person as a father, mother, sibling or relatives; (ii) through some agreed obligation undertaken by a third person to care for the child such as adopted parent, step parent of caretaker; or (iii) by a person who received the child from any person described earlier on the understanding that the giver of the child does not wish or desire to have the child back again. (paras 17-19)

(3) The identities and relationship of both the respondents to each other and their relationship to the child, established from the facts of the case and the police reports, were undisputable. The first respondent had the duty to care for the child. The duty arose when she joined the second respondent in abandoning the child at the mosque. During that period of time, she had joint and immediate possession or custody of the child with the second respondent. Her joint possession or custody of the child meant that she was obligated by law to not expose the child to any physical, mental or emotional harm. The first respondent had the common intention with the second respondent to abandon the child. On that basis, the first ingredient of the offence was sufficiently established against the first respondent. The error in stating the first respondent as the grandmother, and not as a person having care of the child, did not result in any failure of justice. (paras 15, 22 & 25)

(4) The first respondent's plea of guilty was valid in law. The first respondent understood the ingredients of the offence and the consequences of her plea. The plea was therefore unequivocal and unconditional. There was no reason to disturb the Magistrate's decision on the matter. The conviction was safe. (para 27)

(5) The younger the child is, the greater the gravity of the offence. The child was a newborn who was completely helpless and vulnerable. The Magistrate insufficiently addressed the seriousness of the offence. Whilst she correctly took into account the mitigating factors, the Magistrate failed to apply her judicial mind to the proportionality of the sentence to the offence committed. The sentence passed was manifestly inadequate and disproportionate to the offence committed. The decision of the Magistrate was set aside. Taking into account the one month imprisonment which they had, already served the respondents were sentenced to eight months' imprisonment to run from the date of this court's decision. The fine of RM3,500 was ordered to be refunded. (paras 30, 32 & 36)

(6) Notwithstanding the provision of s. 52A of the PC, the offence committed by the respondents was one that attracted the abhorrence of society and a sentence lesser than one that was deterrent would not serve the interest of the public in discouraging a similar offence being committed by others. The exercise of this court's powers under ss. 173A and 294 of the CPC was not appropriate in this case. (para 35)

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Emperor v. Blanchi Constant Cripps (1916) 18 Bom 934 ***(refd)***
Low Hiong Boon (F) v. PP [1948] 1 LNS 147 ***(refd)***
Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
Muhammad Syakir Khan Melok Khan lwn. PP [2019]1 LNS 1171 HC ***(refd)***
Pie Chin v. PP [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 HC ***(refd)***
PP v. Asmarani Ghazali [2020] 2 CLJ 319 CA ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(refd)***
PP v. Mohamed Danny Mohamed Jedi [2018] 5 CLJ 692 CA ***(refd)***
PP v. Shahrul Azuwan Adanan & Anor [2013] 2 CLJ 686 HC ***(refd)***
Ravindran Ramasamy v. PP [2015] 3 CLJ 421 FC ***(refd)***
Wong Siak Fon v. PP [1972] 1 LNS 172 HC ***(refd)***

Legislation referred to:
Child Act 2001, s. 31(1)
Criminal Procedure Code, ss. 173A, 294, 422
Penal Code, ss. 52A, 317

For the appellant - Aishah Al Humayrah Kamaruzaman; DPP
For the respondent - Arafas Abdul Razak; M/s Arafas & Jannah

[Editor's note: Appeal from Magistrate's Court, Butterworth; Criminal Appeal No: PB-83-707-11-2019 (overruled).]

Reported by Najib Tamby

A

JUDGMENT

Mohd Radzi Abdul Hamid JC:

[1] This an appeal by the prosecution against sentence. The first and second respondents were convicted for an offence under s. 317 of the Penal
B Code resulting from a plea of guilty before the Magistrate's Court of Butterworth, Pulau Pinang.

[2] The charge ("charge") reads as follows:

> Bahawa kamu bersama-sama pada 23hb. April 2019 antara 12.30 tengah hari hingga 1.30 petang di kawasan perkarangan Masjid Lama Ara Kuda,
C Tasek Gelugor, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah meninggalkan seorang bayi yang baru dilahirkan dengan niat hendak membuang bayi tersebut di mana kamu merupakan ibu dan nenek bayi tersebut, oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 317 Kanun Keseksaan dan boleh
D dihukum di bawah peruntukan yang sama serta dibaca bersama Seksyen 34 Kanun Keseksaan.

Proceedings Before The Magistrate

[3] Both respondents were represented by counsel appointed by National Legal Aid Foundation (YBGK). Both respondents admitted to the facts of the
E case (exh. P1), the photographs of scene of the crime (exh. P6A-B) and photographs of the infant (exh. P7A-B). Apart from those exhibits, the prosecution tendered the first information report (exh. P2), police report by the attending medical officer (exh. P3), police reports regarding the arrest of the first and second respondents (exhs. P4 and P5) and the chemist report
F on the DNA of the infant and the natural parents (exh. P8). Having satisfied herself that both the respondents understood the charge and the consequences of their plea of guilt the Magistrate accepted and recorded the respondents' plea of guilt.

[4] After considering the mitigation by both the respondents and
G submission by the Public Prosecutor, the Magistrate sentenced both respondents to one month imprisonment and fine of RM3,500, in default seven months' imprisonment from the date of sentence that is 2 December 2019.

The Appeal

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[5] The prosecution being dissatisfied with the sentence now appeals to this court.

[6] There is no cross-appeal by the respondents.

The Law Relating To Appeals Against Sentence

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[7] It is trite law that as set out by the Supreme Court in the case of *PP v. Mohamed Nor & Ors* [1985] 1 LNS 25; [1985] 2 MLJ 200b that the appellate court should be slow to interfere with a sentence passed by the

court below unless it is manifestly wrong. Later in the case of *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193, the Federal Court had clearly stated that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or the court erred in applying the correct principles in the assessment of sentence.

The Appeal

Grounds Of Appeal

[8] The appellant's petition of appeal essentially rests on the issue of inadequacy of sentence given the serious nature of the offence and the age of the victim who was a newborn.

Grounds Of Decision Of Magistrate

[9] In passing sentence the Magistrate took into account the following factors: (i) the respondents' plea of guilty; (ii) that the baby was adopted and therefore was in a safe environment; (iii) that both respondents are single mothers with limited financial resources; (iv) the effect on the second respondent's child of six years old; and (v) that both respondents are first offenders before passing sentence (grounds of judgment at p. 14 to 20 of vol. 1 of the record of appeal) . She held that the imprisonment of one month and a fine of RM3,500, in default seven months' imprisonment against both the respondents was adequate under the circumstances of the case.

Hearing Of The Appeal

[10] At the core of the appellant's submission is that the sentence against the respondents is inadequate taking into account the seriousness of the offence and that the offence of abandoning a newborn baby deserves a deterrent sentence. Learned Deputy Public Prosecutor submitted that the act of abandoning newborn babies has become rampant and is a serious social issue. It was also submitted that second respondent had ample time during her pregnancy to decide on what to do with the unwanted child and it was unacceptable for both the respondents to say in their mitigation that they were under great mental pressure when they decided to abandon the newborn baby. They could have prepared well in advance to approach different organisations who could have taken the child when the time came but instead they chose to leave that decision at the very last moment and when the time came they chose to place the newborn baby in a box and left the box at a mosque. Their act exposed the baby to risks of injury and even death.

[11] Learned counsel for the respondents had argued that the charge against the first respondent is defective since the charge referred to the first respondent as the grandmother and not as person having care of the child as stipulated in s. 317 of the Penal Code. Since the ingredient of the offence requires that the person who committed the offence is either a father, mother

A or a person having care of the child, the charge contained an error with respect to the first respondent since it did not identify the first respondent as a person having care of the child. Learned counsel argued that this court should therefore exercise its powers of revision to set aside the first respondent's plea of guilt. As for the second respondent, learned counsel
B argued that the Magistrate was correct in passing the sentence after taking into account the mitigating factors that were presented to the trial court. Since both the respondents have served their custodial sentence, learned counsel for the respondents pleaded to this court to not disturb the decision of the Magistrate.

C **[12]** On the issue of whether the charge against the first respondent was correctly framed, learned Deputy Public Prosecutor submitted that even if there was an error in describing the status of the first respondent as per the offence, there was no failure of justice occasioned against the first respondent since she had admitted to the facts of the case and the charge. It was further
D argued that the facts of the case had established the relationship of the first respondent to the second respondent was one of mother and daughter. As such, when the baby was given birth, the first respondent was bound to the duty of caring for the child when she accompanied the second respondent to abandon the child at the mosque. That duty of having care over the child was
E present even though it was just for a short moment from the time of birth and until the child was left at the mosque.

Deliberation By This Court

The Charge And First Respondent's Plea Of Guilt

F **[13]** It is trite law that there can be no appeal against a conviction following a plea of guilty. However, a court hearing an appeal against sentence is entitled to, where appropriate act in revision and set aside a conviction where the plea of guilt is bad in law or the charge is groundless (see *Low Hiong Boon (F) v. PP* [1948] 1 LNS 147; [1948-1949] Supp MLJ 135; *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2
G CLJ 209; [1995] 1 MLJ 645; and *Wong Siak Fon v. PP* [1972] 1 LNS 172; [1972] 1 MLJ 203). This court therefore accepts that it can hear arguments touching upon issues of law or fact that may influence the legality of the first respondent's plea of guilt.

H **[14]** With regards to the charge, the ingredients that need to be proven to establish an offence under s. 317 of the Penal Code are that (i) the person charged with the offence must be a father, mother or a person having care of the child; (ii) the child is below 12 years old of age; and (iii) there has been an exposure and abandonment of the child.

I

[15] The relationship of the second respondent as the natural mother to the child was proven by exh. P3 (police report of the attending physician) and exh. P8 (chemist report). In addition to that the second respondent had admitted to the facts of the case as appearing in exh. P1. The first respondent's relationship as the mother to the second respondent was also proven by exh. P3 and exh. P1. The identities and the relationship of both respondents to each other and their relationship to the child is therefore indisputable.

[16] It is clear upon reading the charge that the first respondent was not described as a person having care of the child. The charge described her as the grandmother of the child. Since the charge fell short in describing the first respondent as a person having care of the child for the purposes of s. 317 of the Penal Code it was argued by learned counsel for the first respondent that her plea of guilty should not have been accepted by the Magistrate. It was further argued that it was not proven that the second respondent had transferred care of the child to the first respondent and therefore it cannot be said that the first respondent had care of the child. To support his argument learned counsel for the respondents sought to rely on *Halsbury's Laws of Malaysia – Criminal Law* (vols. 9(1) and 9(1A) and the case of *PP v. Asmarani Ghazali* [2020] 2 CLJ 319. It was learned counsel's contention that there must be proven a transfer, delivery or entrustment of the child by the second respondent to the first respondent.

[17] The fundamental question to be answered therefore is whether the first respondent was a person who had care of the child. The offence under s. 317 of the Penal Code is premised on a criminal breach of duty of a person having care of the child whether that person is the father, mother or a third party (who may or may not have any blood relationship with the child).

[18] Care of child is not defined under s. 317 of the Penal Code. However, guided by the provision of s. 31(1) of the Child Act 2001, it is the considered view of this court that care of a child under s. 317 of the Penal Code means to dutifully protect a child from any form of physical, mental and emotional injury and that duty to protect includes the duty to not expose or leave that child in any place with the intention of abandoning such child.

[19] When does that duty arise and on whom does that duty falls? That duty can arise from either (i) through the natural bond that exists between the child and that such person such as a father, mother, sibling or relatives; or (ii) through some agreed obligation undertaken by a third person to care for the child such as adopted parent, step-parent or caretaker; or (iii) by a person who received the child from any person described earlier on the understanding that the giver of the child does not wish or desire to have the child back again. This duty arises from the basic moral value and norm of a civilised society that a child is a human being who is helpless and incapable

of caring for his own physical and emotional safety and comfort and therefore depends on others for that care. Society through provisions of the law therefore has an expectation that persons having possession or custody over the child will have the duty to care for that child. However, there could be instances where a person whilst being the natural parent of the child may not have the duty to care for the child due to, for example, a divorce where that person does not have custody of that child or that person is away from that child due to some obligation and care of the child is entrusted with another person such as a family member. A mother who may be too occupied to find a living to support her family may deliver the child to a caretaker with the expectation that the child will be returned after a period of time. In those cases the parent cannot be made accountable for any offence committed against the child. It would therefore be a question of fact in each case on who had immediate possession or custody of the child.

[20] The issue of possession and duty to care was considered in the case of *Muhammad Syakir Khan Melok Khan lwn. PP* [2019]1 LNS 1171. Although that case involved the prosecution of an offence under s. 31(1) of the Child Act 2001, the court's consideration on the issue of care of the child is instructive. In that case the accused was a driver of van who was obligated with the duty to send and fetch the victim, a five years old boy to and from a kindergarten. The accused's services was not directly employed by the victim's mother but arose out of a private arrangement between the party that was originally appointed by the mother and the accused. The original services provider delivered the victim to the accused for him to deliver the victim to his kindergarten. The accused then switched vans to send the victim and other children. Unknown to him, the victim was left locked in the van and the victim died due to heatstroke as a result of vehicular entrapment. The accused was found guilty by the trial court and he appealed against his conviction and sentence. In dismissing the appeal, the High Court found, *inter alia*, that the accused was a person who had care of the child. It would be pertinent to note that in this case the accused's services was not engaged by the victim's mother but by the original services provider. She had no knowledge of this arrangement. Yet, because the accused had possession or custody of the child for that period, that duty to care for the child fell on him. Notwithstanding that the issue of care of the child was not challenged in this case, it is evident from the decision of the trial and appellate court that the accused had the duty of caring for the child since he agreed to transport the child to his kindergarten and to pick him up at the end of the school's session. The accused became responsible for the care of the child *albeit* only for that short period of time when he agreed to take the victim into his van.

[21] In the Indian High Court case of *Emperor v. Blanchi Constant Cripps* (1916) 18 Bom 934, the issue of possession and care of a child was considered and the court stated as follows:

> [5] ... We cannot help feeling, however, that in cases of this kind, any person receiving an infant from its mother on the distinct understanding, as in this case, that the mother never desired or wished to have the child back again, must in law be regarded as a person having the care of that child until he or she had transferred it to the care and custody of some other person or institution. The difficulty arises in cases where the care or possession-whatever term be used-intended by the mother, would be in the contemplation of both the persons concerned for an extremely short time. Suppose, for example, the mother desires to abandon her child and on that distinct understanding she requests another to leave it in a lonely field some two minutes distance away, we are still of opinion that during that space of time, the second person carrying the child with no other object than that of exposing and leaving it in the appointed place would have the care of it sufficiently within the meaning and contemplation of Section 317. This can be easily exemplified by retaining all other conditions but extending that of time. Suppose a second case in which the mother makes over her child in India to a person with the intention that that second person should carry the child to South America and there abandon it. The intervening period might be several months and during the whole of that time the person in actual possession of that child would, in our opinion, have the care of that child within the meaning and contemplation of the section and we do not think that in such a case the facts would ever occasion any doubt or hesitation at all. But if we are right, mere extension of time could not afreet the underlying principle, and that principle again would have to be applied in each case with reference to its facts and also with that degree of common sense which Judges of experience are supposed to exercise while administering the criminal law.

[22] Applying the principles as laid down in *Blanchi Constant* (*supra*) to the present facts this court finds that the first respondent indeed had the duty to care for the child. That duty arose when she joined the second respondent in abandoning the child at the mosque. This fact was admitted by the first respondent through exh. P1 and is not disputed. During that period of time she had joint and immediate possession or custody of the child with the second respondent. Her joint possession or custody of the child meant she was obligated by law to not expose the child to any physical, mental or emotional harm which for the purposes of s. 317 of the Penal Code included to not expose the child to abandonment. It is clear that the first respondent had the common intention with the second respondent to abandon the child. On that basis this court holds that the first ingredient of the offence was sufficiently established against the first respondent.

[23] For those same reasons this court disagrees with the argument of learned counsel for the first respondent that there must have been proven a transfer of the child by the second respondent to the first respondent before the first respondent can be said to have had care of the child and that the

transfer must be accompanied by a wish by the second respondent that the child to not be returned. In this court's view, by participating in the act of abandoning the child, the first respondent had placed herself under the duty to care for the child.

[24] Turning to the issue of whether the charge was defective, this court refers to the Federal Court decision in the case of *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421; [2015] 6 MLJ 509. His Lordship Jeffrey Tan FCJ in delivering the judgment of the Federal Court stated:

> [27] Pursuant to s. 156 of the CPC, 'no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission' (the Indian equivalent, s. 215 of the Indian Criminal Procedure Code, ends with the words 'and it has occasioned a failure of justice'). However, in view of s. 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. 'Whether any court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s. 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice' (*Yap Sing Hock & Anor v. Public Prosecutor* [1992] 2 MLJ 714 at p 725 per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).
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> [28] It could also be noted that the 'error' alluded to in s. 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence. That important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss. 156 and/or 422 of the CPC. This is because where it was an error or omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and that there must have been a failure of justice. *Low Seng Wah v. Public Prosecutor* [1962] 1 MLJ 107, was the exceptional case, where Neal J held that the omission of an essential ingredient in the charge was not fatal, because of the unique provisions of s. 321 of the CPC (since repealed) which provided that 'No judgment, sentence or order of magistrate court shall be reversed or set aside unless it is shown to the satisfaction of the court of a judge that such judgment, sentence or order was either wrong in law or against the weight of the evidence'. *Low Seng Wah v. Public Prosecutor*, which was primarily decided under s. 321, is no precedent on s. 156 of the CPC.

[25] Applying the principles set out above, this court finds that the error in stating the first respondent as the grandmother and not as a person having care of the child did not result in any failure of justice. The first respondent fully understood the offence she was charged with and she admitted to the

fact of delivering the child to the mosque and abandoning the child there. There is no confusion with regards to the act that constituted the offence. On the same score, there is no confusion arising from the charge referring to the first respondent and second respondent as the mother and grandmother respectively instead of the other way round. Their identity and relationship were clearly established from the facts of the case and the police reports. The error is curable under s. 422 of the Criminal Procedure Code.

[26] As stated also by Wan Yahya J in the case of *Pie Chin v. PP* [1983] 1 CLJ 316; [1983] CLJ (Rep) 703; [1985] 1 MLJ 234:

> As a rule of the thumb prejudice is an essential ingredient to the failure of justice. The question to be considered here is whether the Appellant has been in any way prejudiced in his defence by this error. If he is not, then no failure of justice has been occasioned. The prosecution in our current case has mistakenly described the word 'State' as 'Federal' in the charges. But for this small error the nature and substance of the offence with which the Appellant was charged remained the same, ie, he, as an agent, corruptly accepted gratification for doing an Act in respect of his principal's affairs. Such an error, to my mind, is one of form rather than substance.
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> Similarly in *Hariprasad v. Nanoo Khan* AIR 1968 Madhya Pradesh 234, 286 the Court held that the error of mentioning a different section in the charge did not vitiate the proceedings. At p. 286 of the judgment Shiv Dayal J. stated:
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> > But where there is inadvertence to frame a charge and the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged, Section 535 comes into play (See observations of Chandrashakhara Aiyar and Jagannadhadas, JJ in *W. Slaney*'s case, AIR 1956 SC 116 (*supra*). In that ruling, Das, Acting CJ and Bose, J went a step further when their Lordships observed that sections 225, 232, 235 and 537 between them cover every conceivable type of error and irregularity referable to a charge that can possibly arise, ranging from cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that whatever the irregularity, it is not to be regarded as fatal unless there is prejudice.
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> In *PE Billinghurst v. Emperor* AIR 1924 Cal 18, 41 where the charge under section 420 of the Penal Code made no mention of the person cheated, the Court held that such failure was not fatal to the case as the accused was not misled by the error. At p. 41 the Court expressed the following opinion:

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> We are of opinion, however, that the omission should not be regarded as a fatal defect in the charge, inasmuch as the accused were not misled and there was no failure of justice by reason of the omission of the above-named particulars from the charge.

> If the appellant, in this Appeal before us, had in the first instance been
B charged as an agent of the State Government, the evidence of the prosecution, but for that relating to the mistake, would have been similar. The appellant's defence would have taken the same course whether he had been charged as a State or Federal agent. The fact is he was an agent of either one and in that capacity he had accepted gratification as an inducement for doing an act in relation to the affairs of his principal –
C which could be either.

> In my opinion the misdescription of the word Federation instead of the word State in the charge had not in any way prejudiced the appellant's defence and that the mistake in the charges were irregularities which are curable by s. 422.

D **[27]** The summation of all the above deliberation brings this court to the conclusion that the first respondent's plea of guilty was valid in law. Based on the notes of proceedings this court is satisfied that the first respondent understood the ingredients of the offence and the consequences of her plea. The plea was therefore unequivocal and unconditional. The first
E respondent's conviction is therefore safe and there is no cause for this court to disturb the Magistrate's decision on the matter.

Adequacy Of Sentence

[28] Moving next to the issue of adequacy of sentence, this court takes
F judicial notice that the Government of Malaysia have recognised that the issue of abandonment of newborn infants is serious and requires urgent solution. For the period 2014 to 2018 there were 577 cases of abandonment of newborn infants and 60% of those cases involved the death of the infants. Within that same period there were 49 cases of abandonment of newborn
G infants in the State of Penang (source *http://www.astroawani.com/berita-malaysia/kawasan-rumah-tandas-lokasi-paling-kerap-kes-buang-bayi-211251; https://www.bharian.com.my/berita/nasional/2019/06/578922/kes-pembuangan-bayi-serius-tpm*). Society therefore expects that the rights of newborn infants be protected through the enforcement of the law. It is the duty of the court to view offences related to abandonment of newborn infants
H as serious and in this court's view nothing short of a deterrent sentence will serve that purpose. It is however a statement of the law that in passing sentence that is appropriate to the offence and its gravity the court shall take into account several factors and balance them in interest of the public and the accused. Each case must be decided by its own facts and circumstances.
I The sentence must be proportionate to the seriousness of the offence.

[29] With regards to the principle of proportionality of sentence to the seriousness of the offence, this court is guided by the decision of the Court of Appeal in the case of *PP v. Mohamed Danny Mohamed Jedi* [2018] 5 CLJ 692; [2018] 6 MLJ 383:

> [14] It is trite law that the sentence must be proportionate to both the seriousness of the offence and the degree of responsibility of the offender. The concept of proportionality was explained in the Canadian Supreme Court case of *R v. Ipeelee* [2012] SCC 13; [2012] 1 SCR 433 in para 37 as follows:
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> > Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serves a limiting or restraining function and ensures justice for the offender.
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> [15] The protection of society is one of the important purposes of punishment under the principle of proportionality. In *Channon v. The Queen* [1978] 20 ALR 1 at p 5 the court stated:
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> > The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose.
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> [16] In the same vein, in *Sumer Singh v. Surajbhan Singh & Ors* (2014) 7 SCC 323, the Supreme Court of India, while elaborating on the duty of the court in imposing sentence for an offence, ruled that it is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of society and legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to social conscience. In a way, it is an obligation to the society which has reposed faith on the court of law to curtail the evil.

[30] On that premise, this court holds the view that the Magistrate had insufficiently addressed the seriousness of the offence. Whilst she had correctly taken into account the mitigating factors in accordance with the law, she had failed to apply her judicial mind to the proportionality of the sentence to the offence committed. Notwithstanding that the child had eventually found a home, that cannot in any measure excuse the risk of injury

and death that the child was exposed to when the child was abandoned at the mosque. There can be no acceptable reason to say that the abandonment of the child is justified. The second respondent's pregnancy did not come in a blink of an eye. It may have been an unwanted pregnancy but the second respondent had all the time during that period to prepare and consider all legal options to surrender the child to any institution or even offer the child to be legally adopted. This court cannot accept the explanation offered during their mitigation before the Magistrate that the respondents were under immense mental stress and had no other option but to abandon the child after they were initially refused entry by the security guard of an orphanage. Their action demonstrated their gross and willful lack of thought, consideration and preparedness to receive the child and to properly surrender the child to be cared for. To put it simply, their only concern was to save themselves from the embarrassment and hardship arising from the birth of the unwanted child. They had no sense of duty, care and sympathy towards the child not only as the grandmother and mother to the child but also as fellow human beings.

[31] It is clear that the Magistrate had exercised mercy in passing sentence on both the respondents after taking into account their plea of guilt, financial status, that they were first offenders without any prior criminal records, that the child was eventually found and adopted and that the second respondent has a six years old child who will need caring. Before this court, learned counsel for the respondents further submitted that the second respondent had suffered hardship when she was arrested merely two days after she gave birth to the baby and that amounted to a great lesson to her. However, mercy must be balanced with what is just in the interest of the public. On the consideration of mercy, Abdul Rahman Sebli J (as he then was) had succinctly stated the following in the case of *PP v. Shahrul Azuwan Adanan & Anor* [2013] 2 CLJ 686; [2013] 8 MLJ 70:

> [11] The general principle is that an appellate court will be slow to interfere with the sentence passed by the lower court unless the sentence is illegal or manifestly inadequate or excessive or that the sentencing judge or magistrate had considered irrelevant factors or had given insufficient or undue weight to some of the facts. However the appellate court will interfere if the sentence is not appropriate, not fitting to the circumstances of the crime and does not reflect public abhorrence or disapproval for that particular type of criminal conduct.
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> [12] There is no hard and fast rule as to what an appropriate sentence is or should be. It must depend on the facts and circumstances of each particular case. Where the law does not fix the penalty for the offence there will always be disparity in the sentences passed by the courts for the simple reason that different facts and different circumstances call for different considerations. Thus the sentencing magistrate may rightly decide that a pauper who steals food out of hunger may be dealt with less severely than a rich man who steals out of greed even though they are charged with the same offence.

> [13] In passing sentence it is natural for the sentencing judge or magistrate to be sympathetic towards the offender. Invariably the offender cuts a lonely figure as he stands alone and subdued in the dock to face punishment. His demeanour, where he is charged with a crime involving the use of violence will be in total contrast with his conduct at the time he committed the offence. His plea in mitigation can sometimes be loaded with emotion, pleading all the usual problems of life. In such situation it is very easy to be swayed by sympathy but this is where the court must stand firm and not shirk from its responsibility to deal properly with evildoers.
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> [14] The sentencing court must only consider circumstances that mitigate the crime and not those that are personal to the offender and unconnected to the crime such as hardship to the offender and his family if he is sent to prison. These are matters that the offender should have thought of before committing the offence. If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society.
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> ...
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> [16] A sentence to be of any use must have the effect of deterring not only the offender from repeating the same offence but also others from following his footsteps. The sentence must commensurate with the seriousness of the offence and must reflect the degree of public disapproval for that particular type of criminal behaviour. The more repulsive the criminal behaviour the more severe the sentence should be. The measure of public disapproval is how the reasonable men and women on the street would react to the criminal conduct the offender is guilty of.

[32] Therefore, after considering the facts of this appeal this court finds that the sentence passed against both respondents was manifestly inadequate and disproportionate to the offence committed. It is this court's view that the younger the child is, the greater is the gravity of the offence. In this appeal, the child was a newborn baby who was completely helpless and vulnerable. By nature, a newborn baby places himself in a position of complete surrender and trust to the person that gave birth to him to care, protect and nurture him within an environment that offers unconditional love, care and safety. It would be very relevant for this court to echo the sentiment of the Court of Appeal in *PP v. Asmarani Ghazali* (*supra*) on this matter. Although the offence committed was under s. 31(1) of the Child Act 2001 and death ensued upon the child in that case, the sentiment of the court regarding the helplessness of a child is a strong reminder on the issue:

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> Children are vulnerable and defenceless and require society and the law to safeguard their interests, which cannot be trampled upon or simply be ignored at the expense of a mistake/misjudgment by some adult.

[33] On the issue that the second respondent has a 6 years old child to care for without a husband, this court refers again to the view of the Court of
B Appeal in *PP v. Asmarani Ghazali* case (*supra*). In responding to the High Court's decision that a long term incarceration would not benefit anybody when the accused had three children of her own to care for, Zabariah Mohd Yusof JCA stated the following:

> The learned High Court Judge said that long imprisonment sentence on
C the respondent would not benefit anybody, especially when the respondent herself has three children of her own. This is where the issue of public interest comes into play, and the learned High Court Judge had erred in his application of this principle. When dealing with the issue of public interest, we have to take into account the balancing aspect of the interest of the accused person and the interest of the public.
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> In considering the issue of public interest, it is of paramount importance that the intention of Parliament be looked into when legislating the Act. The Act deals specifically with ill-treatment, neglect, abandonment or exposure of children by persons having the care of the child. Children, being vulnerable and defenceless as they are very young, require society
E to safeguard their interest ...

[34] Notwithstanding that the child was saved and did not suffer any physical harm or injury, the sentence passed by the Magistrate would not serve as a deterrent to other members of society intent on committing the same offence. The abandonment of a newborn baby breaks down the moral
F value of a civilised society and threatens to reduce the life of a newborn child to one that is worthless and dispensable.

[35] In his earnest attempt to secure leniency for the respondents, learned counsel further submitted that since the offence under s. 317 of the Penal Code falls within the definition of non-serious offence as provided under
G s. 52A of the Penal Code, this court should consider the applicability of s. 173A (power to discharge conditionally or unconditionally) and s. 294 (first offenders) under the Criminal Procedure Code (CPC). With respect to learned counsel for the respondents, this court does not agree with his submissions. Notwithstanding the provision of s. 52A of the Penal Code, this
H court firmly views the offence committed by the respondents as being one that attracts the abhorrence of society and a sentence that is lesser than one that is deterrent will not serve the interest of the public in discouraging a similar offence being committed by others. The exercise of this court's powers under ss. 173A and 294 of the Criminal Procedure Code is therefore
I not appropriate in this case.

Decision

[36] The appeal is hereby allowed and the decision of the Magistrate is set aside. Taking into account the one month imprisonment that has already been served by both respondents, the first and second respondents are hereby sentenced to eight months' imprisonment to run from the date of this decision. The fine of RM3,500 paid by each respondent is ordered to be refunded.